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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1021

STEPHEN F. SCHONBRUN,

Petitioner,

—v.—

COMMANDING OFFICER, ARMED FORCES, OR THE SECRETARY OF THE ARMY, OR HIS AGENTS AND/OR SERVANTS OR THE COMMANDING OFFICER, COMMANDING GENERAL OR HIS DESIGNEE, First Army District, Fort Wadsworth, Staten Island, New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Stephen F. Schonbrun prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 7, 1968.

Opinions Below

The opinion of the Court of Appeals is presented in Appendix B hereto. It is as yet unreported.*

* The records of the District Court and the Court of Appeals, which have been filed with the Clerk of this Court, are referred to as follows: Court of Appeals record is designated as "CA" and District Court record as "DC", and both are printed hereafter as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on November 7, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Are the Army Regulations (AR 601-25) governing exemptions of Reservists from active duty void on their face in that they deny to the Reservist due process and equal protection guaranteed under the United States Constitution?

2. Do the Army Regulations (AR 601-25) contravene the provisions of the statute from which they derive their authority, namely 10 U. S. C. Sec. 271(5), in that they fail to provide clear criteria for determining a Reservist's right to exemption and/or delay in being ordered to active duty on the grounds of extreme personal or community hardship?

3. Assuming, *arguendo,* the constitutional validity of the pertinent Army Regulations, were they applied to the Petitioner in a manner so arbitrary and capricious as to deny him any semblance of genuine administrative remedies and relief, in violation of the constitutional principles of due process and equal protection?

4. Can the Army violate its own Regulations, in particular AR 601-25, par. 3-14.b., by failing to notify a Reservist of the fact that his application for exemption or delay has been denied, by failing to provide him with any reason or reasons therefor, and by failing to advise him of his

right to appeal such decision, and then claim immunity from judicial review on the grounds that the "balancing of the individual's claim against the nation's needs" is a matter "beyond the competence of a court to decide" (CA 43-44)?

5. Is the Army's discretionary refusal to grant a hardship exemption subject to review by the Courts under the applicable provisions of the Administrative Procedure Act?

Constitutional Provisions, Statutes and Regulations Involved

The judgments of the Courts below violate Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution. The statutes and regulations involved are set forth in the appendix to this Petition as Appendix A.

Statement of the Case*

On July 28, 1963, Petitioner became a member of the United States Army Reserves. Thereafter he was assigned to the 203rd Transportation Company.

On April 25, 1968, Petitioner applied for exemption from active duty on the grounds of extreme personal hardship

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* The statement of the case is, as to most of its facts, based upon the allegations in the complaint and Exhibits A through R inclusive, which Exhibits were admitted in evidence by the District Court without objection. The District Court accepted the Exhibits "at face value" and proceeded on the assumption that everything set forth in the "moving papers" was "correct" (DC at 7-8). Exhibits A through R are attached hereto as Appendix C.

as well as extreme community hardship, in accordance with 10 U. S. C. Sec. 271(5) and 32 C. F. R. Sec. 125.3(b). Petitioner wrote letters to his Commanding Officer (Exhibits A and E) seeking exemption based upon his wife's serious mental illness, on the one hand, and his irreplaceability as a public school teacher of emotionally disturbed children, on the other. In support of his exemption request, Petitioner submitted a number of letters from school authorities substantiating his claim of extreme community hardship (Exhibits B, C and D), and from psychiatrists, psychologists and other knowledgeable professional persons substantiating his claim of extreme personal hardship (Exhibits F, G, H, I and J).

These reports and letters attest to the fact that Petitioner's wife suffers from a serious emotional personality disorder and that Petitioner's presence in the household materially assists her, tends to promote her recovery, and that his departure would have a serious and immediate deteriorating effect upon her condition. Mrs. Schonbrun attempted suicide as recently as December of 1967 and, according to Dr. Drucker, any prolonged separation from her husband is likely to result in "a psychotic depression, the consequences of which might be quite serious in view of the prior history" (Exhibit F). There is a general consensus in the reports and letters in support of Petitioner's claim of extreme personal hardship to the effect that Petitioner's reporting for active duty would place his wife in serious physical and emotional jeopardy.

In support of his application for exemption on the grounds of extreme community hardship, Petitioner has documented the fact that he teaches a class of ten severely disturbed boys in a Special Service School located in a

poverty area in Queens, New York, the student population of which is virtually 100% Negro. The pertinent exhibits make it clear that Petitioner is specially trained and equipped for this difficult and taxing teaching situation, that he has had remarkable success with these emotionally disturbed children, that he is "absolutely irreplaceable" in this professional capacity, and that his loss to the community would be an irreparable one constituting an extreme community hardship (Exhibits B, C and D).

On May 6, 1968, Petitioner was given a thirty-day extension in connection with his application, and he was advised by his Commanding Officer to contact Fort Wadsworth for further instructions. He was never officially notified that his application was denied, and only succeeded in learning of this as a result of contacting his Congressman (Hon. Benjamin Rosenthal) and his Senator (Hon. Jacob Javits). His inquiries with the Army yielded no information and he was specifically advised by the 1st U. S. Army Field Office that they had no knowledge of his appeal.

Throughout the entire proceedings described in the preceding paragraph, Petitioner was never advised by the Army of the procedures he had to follow in order to establish his claim of personal hardship and community hardship. He was never informed of any standards or criteria upon which to base an appeal from a denial of his claim to exemption, nor did the Army advise him that he even had a *right* to such an appeal. Although Army Regulations 601-25, par. 3-14, require that when an Area Commander denies a request for exemption or delay, he must "notify the member of such denial and the reason therefor, together with his right to appeal such decision," no such reason for the denial was ever given or the Petitioner advised of his right to appeal such decision.

Petitioner's Reserve unit was activated on May 13, 1968. On June 6, 1968 an "appeal" from the denial of Petitioner's request for exemption was directed to the Commanding General of the First U. S. Army in the form of a letter signed by Petitioner. In addition to rehearsing the basis for his claim to extreme community hardship, Petitioner offered further evidence concerning the psychotic deterioration of his wife during the preceding weeks, documented by a subsequent report from Dr. Drucker attesting to the deepening of Mrs. Schonbrun's depression "quite possibly to psychotic proportions with the production of another suicide attempt" (Exhibits K and N).

In addition, Petitioner specifically requested a hearing for purposes of examination of his wife in the event that the medical reports were not deemed sufficient by the Army to grant the requested exemption from active duty.

Nothing further was heard from the Army until June 19, 1968 when the Petitioner received a telegram advising him that his "appeal" had been "considered" on June 14, 1968 and "disapproved" (Exhibit R). The sole explanation for this disapproval by the Army was "that the case did not meet the criteria for exemption from involuntary call to active duty as established in AR 601-25".

Within two days of the receipt of this telegram, Petitioner addressed a letter to the Commanding General at U. S. Army Headquarters in Fort Meade, Maryland, requesting an opportunity for advice as to the rules and procedure for appeals of this type, seeking the assistance of legal counsel in the Judge Advocate General Corps, requesting an opportunity for a personal appearance before an Appeal Board, requesting the opportunity to confront any officer opposing his appeal as well as to learn the factual basis for any such

opposition, and advice and information as to the procedures available to him to further pursue his appeal or his rights under the law (Exhibit O). In reply to this inquiry, the Department of the Army advised Petitioner that its decision in this matter was "final" and that "no further appeals are authorized", and ordered him to comply with its previous instructions to report for active duty.

Petitioner initiated this proceeding for habeas corpus in the District Court for the Eastern District of New York. His application was denied by the Hon. Jack B. Weinstein.

The jurisdiction of the District Court to grant a writ of habeas corpus was invoked by Petitioner under 28 U. S. C. Sec. 2241. The Court of Appeals adopted the position that the District Court, whether or not habeas corpus was properly available to Petitioner, was free to treat his petition as one for mandamus under 28 U. S. C. Sec. 1361.

In denying Petitioner's application, the District Court emphasized that the matter of personal hardship was not one "peculiar to this Reservist" since the wives of all men called into the Armed Forces suffer hardship "to a lesser or greater degree" (DC 47). On the issue of community hardship, it concluded that the weighing of hardship to the community in losing Petitioner's services as against the hardship to the United States in losing his military services on active duty was "peculiarly the kind of decision that must be made by the military" (DC 47).

In affirming the decision below, the Court of Appeals similarly emphasized that the administration of the "extreme hardship" exemption "necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place

to place in a manner beyond the competence of a court to decide" (CA 43-44). Although there were and are no facts in the record to substantiate this, the Court of Appeals adopted the position that a delay in Petitioner's call-up, "even during the period necessary for judicial consideration of his claim to discretionary exemption" would necessarily give rise to "a gap in the unit or the call of another Reservist who otherwise might not have been reached." While conceding that Petitioner's personal hardship claim was "scarcely disposed of by the comment of the District Judge", the Court of Appeals nevertheless felt obliged to affirm the denial of habeas corpus out of regard to fear of a Pandora's box of "unmeritorious applications that might be loosed" by interfering with "the military's exercise of discretion" which the Court deemed an inevitable effect of delays which would be caused in the "efficient administration of personnel who have voluntarily become part of the Armed Forces." It concluded:

> ". . . this is a subject on which civil review of discretionary action by the military should be declined—and *this irrespective of the rubric under which the action is brought.* While the Army's alleged violation of its own regulations, in failing to give notice of denial of his initial request and the reasons for it, might stand differently, Schonbrun was not prejudiced thereby." (Emphasis added, CA 44-45.)

The Court of Appeals granted a stay pending appeal from the District Court. Subsequent to the rendering of its decision it granted Petitioner's motion to stay the issuance of the mandate pending application to this Court for a writ of certiorari to the extent that the issuance of the mandate was stayed until December 12, 1968.

Reasons for Granting the Writ

Certiorari should be granted in this case (1) because of conflicts of decisions within and between several Courts of Appeal which have dealt with these issues in cases arising before them; (2) because it involves important questions of Constitutional and statutory law which need settlement by this Court; (3) because it directly and immediately affects a very large number of men in the military Reserves; and (4) because of clear error in the refusal by the lower Courts to require the Army to be bound by its own as well as its governing regulations.

I.

Conflicts in lower-court decisions.

The decision of the Court of Appeals in the instant case is not only in direct conflict with a decision of a Court of Appeals in another Circuit, but is irreconcilable with a decision by a different panel of Judges within the *same* Circuit. Where such conflicts in deciding federal law have emerged between and within Courts of Appeal, whose consequences are likely to be profound and continuing, this Court has generally granted certiorari as of course. See e.g., *Commissioner* v. *Bilder,* 369 U. S. 499, 501 (1962) and *United States* v. *Calamaro,* 354 U. S. 351, 354 (1957).

Not only has the Court of Appeals for the Second Circuit rendered a decision in direct conflict with the case at bar, but, as will be demonstrated, it followed the authority of that case in a later case as well.

Hammond v. *Lenfest,* 398 F. 2d 705 (1968), involved a Naval Reservist who, pursuant to the pertinent Naval

Regulations, requested a discharge on the grounds of being a conscientious objector. His request was submitted to his Commanding Officer (Lenfest) who recommended his discharge and forwarded his request to the Chief of Naval Personnel who, in turn, obtained an advisory opinion from the Director of Selective Service. Relying upon this opinion (that Hammond was not entitled to a conscientious objector status) the request for discharge was refused by the Navy. The advisory opinion and ultimate denial were based solely upon Hammond's file. No hearing was held either by General Hershey or by the Chief of Navy Personnel, the only hearing having been a personal interview with Commander Lenfest. A petition for habeas corpus was denied by the District Court on grounds of lack of jurisdiction and Hammond's failure to exhaust his available military and administrative remedies.

The Court of Appeals reversed, holding that the case was ripe for adjudication and the District Court should have ruled on the merits of the petition.* Had the same *ratio decidendi* been applied by the Court of Appeals to the case at bar, it would have been reversed and the case remanded.

The Court in *Hammond* makes three main points: (1) that habeas corpus is a proper remedy for a Reservist seeking a discharge; (2) although in matters of military need or necessity, judicial review is ordinarily improper, this was not the case here where there was nothing in the

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* On petition for re-hearing, in light of the information that the Navy had adopted new regulations pertaining to administrative discharge of conscientious objectors, the Court, *per curiam*, remanded the case to the District Court to return the case to the Navy Department "with directions that Hammond's application be processed in accordance with the regulations." *Supra*, at 718.

record to indicate any such overriding military exigencies, and, to assume so, would be a "gross fiction"; (3) actions by military authorities which violate their own regulations are reviewable by civil courts.

In the case of Petitioner, the Court of Appeals wavered on the issue as to whether or not a reservist seeking exemption from activation for duty was entitled to the remedy of habeas corpus. It proceeds to side-skirt the issue entirely by treating the action as one for mandamus under 28 U. S. C. Sec. 1361 (CA 42). Although it is obvious that this case and *Hammond* are not on all fours to the degree that the one seeks to avoid a call-up to active duty and the other seeks a discharge, it is respectfully submitted that this is an extremely superficial basis for distinction. What is clear in both cases is that, as Reservists, both applicants were "in custody" within the meaning of 28 U. S. C. Sec. 2241, which Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." *Jones* v. *Cunningham,* 371 U. S. 236 at 238 (1963), quoted with approval in *Hammond, supra,* at 710.

The Court of Appeals below appears satisfied as to the reality of the "custody" of a Ready Reservist such as Petitioner, citing both *Jones* and *Hammond.* It holds that these decisions make it "clear" that that Petitioner's status as a member of the Armed Forces imposes the kind of "restraint on his liberty" intended to be reached by the statute (CA 41). Having gone this far, the Court hastily retreats from this position, leaving the issue in limbo and treating the petition as one for *mandamus.* The habeas issue clearly merits resolution and settlement by this Court,

not only in the light of *Hammond,* but *United States ex rel. Altieri* v. *Flint,* 142 F. 2d 62 (2 Cir. 1944) and *In Re Green,* 156 F. Supp. 174 (S. D. Cal. 1957), appeal dismissed as moot at 264 F. 2d 63 (9 Cir. 1959).

The area of clearest incompatibility as between the case at bar and *Hammond* is in the application of the doctrine of military need or necessity. The Court below not only took upon itself to "find" that an exemption for Petitioner would create a "gap in the unit or the call of another reservist who otherwise might not have been reached" (CA 44) without the benefit of anything in the record to substantiate this conclusion. It held that a decision on exemption based on hardship is necessarily left to the discretion of the military *regardless* of military necessity. Such judicial abstention is required in order to avoid a "flood of unmeritorious applications" and in general to insure "the efficient administration of personnel" in the Armed Forces (CA 44). This approach is totally irreconcilable with the decision in *Hammond,* which similarly protested its unwillingness to interfere in military matters or to interject the judiciary into decisions based on military exigencies. Thus, the Court held:

> "Specifically, we have not held that a decision based on military exigencies refusing to discharge a serviceman lawfully in the Armed Forces—the situation that would have been presented, for example, if a soldier on a battlefield during World War II had been refused a discharge because of the needs of the service—is subject to judicial review. The federal courts have neither appropriate judicial standards nor the capacity for dealing with such questions . . . Moreover, the ever-present and urgent need for disclipine in the Armed

> Services would alone explain the relative freedom of the military from judicial supervision. Nevertheless, in 1953 the Supreme Court indicated that in appropriate circumstances even a court-martial proceeding —the ultimate method of enforcing discipline—could be reviewed in a civil court on application for a writ of habeas corpus. *Burns* v. *Wilson*, 346 U. S. 137 . . . " *Supra*, at 710, 716.

Neither *Hammond* nor the case of Petitioner involve issues of military need or necessity. Indeed, it may be argued that Petitioner's case is even stronger in that Respondents' room for discretion is far narrower than that available to the military authorities in processing an application for discharge based on a claim of conscientious objection.

In the case at bar, the Court below recognizes that the Army may have violated its own Regulations, in which instance the case "might stand differently" insofar as the doctrine of judicial nonintervention is concerned. However, it then proceeds to avoid dealing with this issue with a five-word disclaimer to the effect that "Schonbrun was not prejudiced thereby" (CA 45). It is Petitioner's contention that, quite the contrary, he was seriously prejudiced by the Army's failure to abide by its own Regulations (which issue is treated in more detail in IV below). The controlling rule of law set forth in *Hammond* is even more strongly applicable to the case at bar, namely:

> " . . . a validly promulgated regulation binds the government as much as the individuals subject to the regulations, and, this is no less so because the governmental action is essentially discretionary in nature. See *Service* v. *Dulles*, 354 U. S. 363, 372 . . . (1957) . . .

Vitarelli v. *Seaton,* 359 U. S. 535 . . . (1959) . . . " *Supra,* at 715.

Actually, the deference by the Navy to the opinion of General Hershey was called for by the Navy Regulations. Nevertheless, the Court concluded that that decision was subject to judicial review on a petition for habeas corpus in the same manner as other status classifications of the Selective Service System. Thus, the two cases are closely parallel in that both involve the issue of judicial reviewability of factual determinations by the military based on military regulations, as well as in both instances a failure on the part of the military to abide by their own regulations.

The principles set forth in *Hammond* were followed by the Court in *United States ex rel. Mankiewicz* v. *Ray et al.,* 399 F. 2d 900 (2 Cir. 1968). There, habeas corpus had been denied to Petitioner, a Navy Reservist, again for want of jurisdiction and failure to exhaust military remedies. On appeal the Court held that, even though a court-martial had already been convened, the case should be returned to the Navy with directions that Mankiewicz' application for discharge as a conscientious objector be processed and determined according to the new Navy Regulations. The Court, it should be noted, stressed the fact that the petitioner was entitled to "a form of hearing with counsel before an officer presumably qualified to deal with the oft-times delicate and sensitive subject of his application." *Supra,* at 901. It also noted the failure of the Navy to follow its own required procedures as well as its failure "to state any grounds or reasons for denial of the application" causing the Court to "speculate what the basis for the

action was." *Ibid.*, at 902. The *Hammond* decision was cited with approval as authority for the Court's holding.*

The Court of Appeals for the Fifth Circuit refused to follow the majority in *Hammond,* and quoted the dissent of Judge Friendly with approval. In the case *In Re Kelly,* 401 F. 2d 211 (5 Cir. 1968), petitioner was denied habeas corpus and a stay of his general court-martial by the District Court, although he claimed that the Army had failed to make available to him his right to apply for discharge as a conscientious objector under the Army Regulations. The Court specifically noted that "two Circuits have taken differing positions on the necessity of exhaustion procedures of the military justice system by the habeas petitioner who was in the military service . . .", citing *Noyd* v. *McNamara,* 378 F. 2d 538 (10 Cir. 1967) and the *Hammond* decision. *Ibid.*, at 213. It contented itself with the following conclusion in denying petitioner's request for summary relief:

> "We are unwilling to presume in this case that the military courts will not fully and fairly consider the claims by petitioner of the violation of his constitutional rights and of failure of the Army to abide by its own regulations." *Ibid.*, at 213.

It being one of the prime purposes of certiorari jurisdiction to bring about uniformity of decisions among the federal Courts of Appeal on important matters, it is respectfully submitted that such clear and irreconcilable con-

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* It is interesting to note that Judge Henry Friendly, who wrote the opinion for the Court of Appeals in the case at bar, wrote the dissenting opinion in *Hammond* and filed a separate concurring opinion in *Mankiewicz* in which he indicated his objection to any "extension" of *Hammond* to other cases.

flict among the Courts and *within the same Court* as above described warrants the granting of certiorari in the case at bar.

II.

Constitutional and statutory issues.

A. *Constitutional Questions*

The central constitutional issue raised by the case at bar is whether Respondents may activate a reservist who seeks exemption based on extreme personal and community hardship, in the complete absence of any prior opportunity to be fairly heard by an administrative tribunal whose procedures and criteria for decisions are reasonably ascertainable. Is a reservist entitled to the Fifth Amendment guarantees of due process and to equal protection under the Fourteenth Amendment?

It is noteworthy that neither the District Court nor the Court of Appeals below concluded that Petitioner had the benefit of due process in the Army's processing of his claim. Thus, Judge Weinstein, assuming everything claimed by Petitioner was "correct" (DC 48), and assuming the "truth of all the statements" made by him, nevertheless fell back upon the doctrine of judicial non-intervention in "matters touching on military affairs" (DC 46). An almost complete judicial deference to the decisions of the military in cases of this kind is reflected in the following passages from Judge Weinstein's reasoning:

> "But the weighing of the hardship to the local community and the hardship to the United States in calling

> up of reservists is peculiarly the kind of decision that must be made by the military . . . (As to personal hardship) This is a matter again that the government, through its Armed Forces authorities, must consider. If this Court were to inject itself into every call up of a reservist because of factors of this kind, it might well disrupt the entire reservist structure . . . (As to due process) . . . the very nature of a reservist serving in a unit such as the petitioner requires in cases of national emergency that he be called up rapidly and without a great deal of adjudication within the Service" (DC 46-47).

The Court of Appeals below has adopted a similar abstention doctrine where the military are concerned. Recognizing that administration of the hardship exemption "necessarily involves a balancing of the individual's claims against the nation's needs," * the Court concluded that the differences in the "balance" from case to case and with changing time and place were such as to be "beyond the competence of a court to decide" (CA 44). Having thus abdicated a time-honored judicial role to the Army authorities, the Court seeks further justification for its ra-

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* This very phraseology imports a classic judicial function under the Constitution. Thus, for example, in the words of Mr. Justice Brennan: "The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas . . ." *Jacobellis* v. *Ohio*, 378 U. S. 184 at 194 (1964).

tionale by introducing a parade of military horrors in the form of "a flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion" (CA 44).

The reasoning of the Courts below is completely at odds with the Constitutional principles of due process and equal protection, on the one hand, and checks and balances, on the other. Judicial review is abandoned in favor of expeditious military decision-making, in Judge Weinstein's words, "without a great deal of adjudication . . . " In this context, it is well to recall the characterization of military justice by Mr. Justice Black in *Reid* v. *Covert,* 354 U. S. 1 at 26 (1957):

> "For martial law, which is built upon no settled principles, but is entirely arbitrary in its decision, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as law."

What better example of this than the facts in the case at bar? In the face of a substantial claim by Petitioner to severe hardship, he encountered a complete absence of any semblance of due process, despite bona fide efforts to exhaust all of the Army administrative machinery which was made available to him. The following facts are totally inconsistent with Constitutional requirements, namely: (1) No grounds were given by the Army for refusing Petitioner's initial request for exemption. (2) No notice of the denial of his request was given him. (3) No opportunity was given Petitioner for an appearance and hearing before his Commanding Officer, although he specifically requested such a hearing. (4) Petitioner was not informed as to the criteria for determining extreme hardship, nor was he

advised as to the procedure for taking an appeal from an adverse decision. (5) Petitioner had no opportunity to appear and present evidence before the Appeal Board, despite his request in writing that he be given such opportunity. (6) Petitioner was denied the opportunity to confront witnesses and to examine evidence in opposition to his request for exemption, so that he could meet or disprove this evidence and cross-examine any such witnesses.

It is axiomatic that persons subject to military law are not deprived of their Constitutional rights. On the contrary, the decision of this Court in the case of *Burns* v. *Wilson, supra,* laid to rest any prior misconceptions to the effect that the Armed Services were, by reason of their military status, deprived of the protection of the Bill of Rights. In the words of Mr. Justice Frankfurter, there can be no doubt that the military is "not freed from the requirements of the due process of the Fifth Amendment." *Ibid.,* at 149. See, also, *Harmon* v. *Brucker,* 355 U. S. 579 (1958) where federal courts were held to have jurisdiction to review a discharge pursuant to the military's loyalty program. More recently, even a court-martial decision was held subject to federal habeas jurisdiction. *Palomera* v. *Taylor,* 344 F. 2d 937 (10 Cir. 1965).

B. *Statutory Questions*

Among the substantial issues raised by this Petition are whether (1) the pertinent Army Regulations are inconsistent with the provisions of 10 U. S. C. Sec. 271(5) and 32 C. F. R. Sec. 125.3, and therefore facially invalid; (2) whether the procedure, including "appeals", under the Army Regulations pertaining to hardship are so vague, ambiguous and devoid of fundamental fairness, as to be

constitutionally invalid; and (3) whether the Administrative Procedure Act applies to cases of this kind.

(1) The statute controlling exemption or release from the Ready Reserve on hardship grounds is 10 U. S. C. Sec. 271(5). This calls for "a system of continued screening" of Ready Reserve members so as to "insure that members whose mobilization in an emergency would result in an extreme personal or community hardship are not retained in the Ready Reserve" (App. A 31).

This clear statutory direction is bolstered by the language of the Regulations prescribed thereunder (App. A 32). Upon a showing of extreme personal or community hardship the Ready Reservist, according to 32 C. F. R. Sec. 125.3(b) "shall, upon request, be transferred to the Standby Reserve." In the case of extreme personal hardship, two criteria are set forth: (1) that the hardship be "greater than that which dependents of other Reservists can be expected to experience" from the order to active duty; and (2) that the criteria for Selective Service Regulations on extreme hardship deferment be followed.

The provisions of AR 601-25 impose burdens upon the Reservist claiming extreme hardship which are nowhere authorized and, in many respects, contradict the statute and the regulations. In the first place, the Army Regulations limit hardship exemption or delay to "exceptional cases" which the statute and the regulations do not (AR 601-25, par. 3-2(3)(a)). Second, AR 601-25 par. 3-11.c. contains several grounds for refusal to even consider hardship exemptions or delays which are inconsistent with the spirit and the letter of the federal statute and regulations. Third, the actual criteria for hardship conditions are far

more limited and stringent than those called for under the federal law as applied in 32 C. F. R. Sec. 125.3(b)(1), and are also at variance with the Selective Service Regulations to which they are required to conform. (See App. A 33-34.)

(2) According to the Army Regulations, the "determination" of Petitioner's initial request for exemption or delay must be made by his immediate commander. The latter obviously has an interest in the retention of every reservist under his command. He is less likely to apply the statute and regulations with proper impartiality and fairness than another officer whose command would not be affected by such exemption or delay.

So-called "appeals" under AR 601-25 are subject to determination by the area commanders, who forward "appeal requests", together with their "recommendations" to the Commanding Officer of the Army Reserve Components Personnel Center. Although the Army Regulations require the area commander having jurisdiction over the requests for delay or exemption to notify the Reservist of "the decision rendered" and, in case of denial, "the reason therefor" and his "right to appeal" (par. 3-14, a-b), there is no indication of (a) whose "decision" is referred to; (b) the manner in which the "reason" has been arrived at; (c) the sources of information and the nature of the evidence (other than the applicant's) resorted to in order to arrive at this "reason"; (d) the procedure for perfecting the "appeal"; and (e) to whom such an "appeal" is to be directed.

The utter sham of these proceedings is highlighted by the fact that the Reservist is denied any opportunity to a hearing enabling him to present evidence other than

written documents in his behalf, to confront and examine evidence which may be or may be construed to be derogatory to his claim, to be represented by counsel or by *any* representative in his behalf, and, as a practical matter, to have the benefit of a determination by an impartial tribunal.

It should be noted that the only section referring to "appeals" in AR 601-25 is par. 3-15. Such appeals are limited only to those cases where the reservist "can furnish additional evidence which may warrant further review of his original request." In such cases, the matter is treated as an "initial request for delay or exemption." It is obvious that this is not an appeal in a real sense at all, but an application *de novo* provided the Petitioner has additional evidence to present. An administrative review of the commanding officer's original determination on its merits is thus completely absent.

The lack of opportunity to be heard and to be represented by counsel might be remedied by a genuine procedure for administrative review. See 1 Davis, Administrative Law Treatise Sec. 7.10 (1958). But in the case at bar even this procedure is, as a practical matter, totally absent.

Thus, the Army Regulations on their face deny the reservist an opportunity to a trial-type of hearing on issues of adjudicative facts. This infirmity is then compounded by the absence of any administrative appeal.

(3) The Court of Appeals has conceded its own uncertainty as to whether the Administrative Procedure Act applies to Respondents' actions in the case at bar (App. B,

pp. 44-45 note 2). It resolves this uncertainty in favor of denial of judicial review.

This aspect of the decision below raises an issue of considerable magnitude. The Administrative Procedure Act specifically affords judicial review to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ." (5 U. S. C. Sec. 702).

Although the term "agency" under the Act specifically excepts "courts martial and military commissions" and "military authority exercised in the field in time of war" (5 U. S. C. Secs. 551 and 701), neither of which is apposite here, it otherwise would appear to include the military.

The Court below attempts to avoid the strict requirements of the Act by concluding that a refusal to grant a hardship exemption is one which is "committed to agency discretion by law"—hence, within the exceptions to the statute. See 5 U. S. C. Sec. 701(a)(2). But there is little in the relevant provisions of the statute or regulations to support this opinion. There are no words of discretion such as "in its judgment" or "when he is satisfied." The statute here is mandatory, rather than a "permissive type", a distinction drawn by the court in *Ferry* v. *Udall,* 336 F. 2d 706, 711-12 (9 Cir. 1964). This is the case even though the courts have recognized that, in cases of the former type, the administrative decision involves some degree of discretion. *Knight Newspapers, Inc.* v. *United States,* 395 F. 2d 353 (6 Cir. 1968).

Depending on the significance of the questions before it, this Court has given wide scope to the right of judicial

review even where the governing statute has undergirded the apparently discretionary nature of the agency action with the adjective "final". See *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 149-50 (1967); *Gusik* v. *Schilder,* 340 U. S. 128, 132 (1950); and *Estep* v. *United States,* 327 U. S. 114, 119-20 (1946).

In *Heikkila* v. *Barber,* 345 U. S. 229 at 232 (1952), the Court stressed that the spirit of the House and Senate Reports on the Act, taken together with its "broadly remedial purposes . . . counsel a judicial attitude of hospitality towards the claim that §10 [now Sec. 701(a)(2)] greatly expanded the availability of judicial review." See also Berger, "Administrative Arbitrariness and Judicial Review", 65 Col. Law Rev. 55 (1965).

Thus, under the provisions of the statute, there is further statutory authority for review of Petitioner's claim, and the District Court had jurisdiction to grant the petition for habeas corpus.

III.

Persons affected by questions presented.

A further ground for the granting of certiorari in this case is that it directly and immediately affects a substantial number of Reservists presently on active duty.

In May of 1968, some 20,000 Army Reservists were involuntarily activated and, as a result of this activation alone, the Delay and Exemption Board at Fort Benjamin Harrison received 527 appeals and referrals for delay or exemption on the grounds of extreme hardship as of No-

vember 30, 1968.* This figure does not include applications of enlisted men which were denied by their commanders and not appealed, nor does it include applications or appeals in other branches of the Armed Forces.

Thus, it is obvious that a substantial number of Reservists have been and will continue to be affected by the application and judicial construction of the regulations referred to in this case. It should also be noted that, in the case of a Reservist, we are dealing with a civilian-soldier who is going about his normal civilian duties and occupations until and unless he is involuntarily activated. Such call-ups are frequently unpredictable and obviously more likely to give rise to extreme personal hardship or extreme community hardship than the draftee who is on notice of his draft classification and in a far better position to predict the time of his being called to service and to prepare accordingly.

IV.

Errors below.

The Court below failed to recognize that Army Regulation 601-25 was defective in substance, in that it failed to conform with 10 U. S. C. 271 and 32 C. F. R. 125.3, and defective in form, in that it failed to provide the procedure whereby the Reservist's application would be fully and fairly heard and determined.

In addition, the Court glossed over the Army's flagrant violation of its own regulation to the prejudice of the

* The figures cited in the text were obtained by counsel from the U. S. Army Reserve Components Personnel Center, located at Fort Benjamin Harrison, in Indianapolis, Indiana.

Petitioner. The Petitioner's commander was obliged by the Army regulation to (1) return the application with specific indication of any additional information required, (2) notify the Petitioner of his decision, and (3) notify the Petitioner of the reason for his denial together with his right of appeal. None of these requirements were met. It has been consistently held that a validly promulgated regulation binds the Government as well as the individuals subject to the regulation; and this is no less so because the governmental action is essentially discretionary in nature. *Service* v. *Dulles*, 354 U. S. 363 (1957); *Vitarelli* v. *Seaton, supra; United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1953); *Dunmar* v. *Ailes*, 348 F. 2d 51 (D. C. Cir. 1965); *Roberts* v. *Vance*, 343 F. 2d 236 (D. C. Cir. 1964).

In *Hammond* v. *Lenfest, supra*, the Court of Appeals held that the District Court should have ruled on the merits of the petition for habeas corpus because the Navy's decision was not grounded in considerations of military need and, therefore, the validity of the Navy's decision was subject to review. In this case, we do not know upon what considerations the Army based its denial, because of the omissions by the commander, and the deliberate vagueness of the appeal board's decision. If the Army had rendered a decision for improper reasons, the District Court would clearly be empowered to inquire into the merits of such a decision under the doctrine of *Hammond*. The Army by its failure to state the reasons for its decision, (1) attempts to avoid the doctrine of *Hammond*, and (2) denies the Petitioner his right, as granted by the Army regulation, to know the reasons which prompted the commander's denial, so that he may, on appeal, furnish supplementary

documentation, in accordance with AR 601-25, par. 3-15, or attack the validity of the commander's decision as not being predicated on considerations of military need.

The Court of Appeals for the Second Circuit in the case of *U. S. ex rel. Mankiewicz* v. *Ray,* cited *supra,* noted that the applicant under the new conscientious objector regulations has a right to a form of hearing with counsel and that the determining officer is required to make a recommendation with his reasons. The Court further noted that the Petitioner was prejudiced by the Navy's failure to follow its own regulation wherein the interviewing officer was not the commanding officer and the Chief of Naval Personnel failed to state any grounds or reasons for denial of the application, as required.

It is respectfully submitted that there is either a direct irreconcilable conflict between the decision in *Mankiewicz* and the decision in this case, or the Court of Appeals is granting an application for conscientious objector status greater protection of the law than an application for delay or exemption based on extreme hardship.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to review the judgments below.

Respectfully submitted,

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January 10, 1969

APPENDICES

APPENDIX A

[STATUTES AND REGULATIONS CITED]

5 U. S. C. Sec. 551 Definitions

"For the purpose of this subchapter—

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;"

5 U. S. C. Sec. 701 Application; definitions

"(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) 'person', 'rule', 'order', 'license', 'sanction', 'relief', and 'agency action' have the meanings given them by section 551 of this title."

5 U. S. C. Sec. 702 Right of review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

10 U. S. C. Sec. 271 Ready Reserve: continuous screening

"Under regulations to be prescribed by the President, each armed force shall provide a system of continuous screening of units and members of the Ready Reserve to insure that— . . .

(5) members whose mobilization in an emergency would result in an extreme personal or community hardship are not retained in the Ready Reserve."

28 U. S. C. Sec. 1254 Courts of appeals; certiorari; appeal; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U. S. C. Sec. 1361 Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an

officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U. S. C. Sec. 2241 Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

32 C. F. R. Sec. 125.3 Regulations for screening the Ready Reserve.

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"(b) Extreme hardship. Members of the Ready Reserve whose call to active duty in an emergency would result in extreme personal or community hardship as defined by the Secretary of Defense shall, upon request, be transferred to the Standby Reserve. Reservists shall be informed of the following definitions of hardship:

(1) Extreme personal hardship. An individual desiring transfer from the Ready Reserve to the Standby Reserve must establish by documentary evidence that his dependents would, by his call to active duty in an emergency, suffer extreme hardship greater than that which dependents of other Reservists can be expected to experience from the Reservist's order to active duty. In order to insure a uniform standard, the criteria established by the Service should conform generally with current Selective Service regulations on extreme hardship defer-

ment. In those cases where the reservist is registered with Selective Service, documentary evidence may include a recommendation by the State Director of Selective Service of the State in which the registrant's Local Board is located. Requests for consideration under this paragraph must be initiated by the Reservist or by his dependents.

(2) Extreme community hardship. An individual desiring transfer from the Ready Reserve to the Standby Reserve must establish by documentary evidence that his withdrawal from the community in a national emergency would have a substantially adverse effect on the health, safety or welfare of the community. In those cases where the reservist is registered with Selective Service, documentary evidence may include a recommendation by the State Director of Selective Service, of the State in which the registrant's Local Board is located. Requests for consideration under this paragraph must be initiated by the Reservist."

Army Regulation 601-25:

"3-2. Delay and exemption policies.

. . . b . . . (3) . . . Delay or exemption of all Ready reservists, other than those described in (1) and (2) above, is authorized in accordance with either of the following criteria:

(a) In exceptional cases when the involuntary order to active duty will result in an extreme personal or community hardship (para 1-12);"

* * * * *

"1-12. Criteria for hardship conditions.

a. Extreme personal hardship.

"(1) Illness of a member of immediate family. When, in the opinion of the attending physician, the illness of the member is such that—

(a) Fatality appears to be imminent; or,

(b) Presence of the reservist is an important factor in the recovery of the patient and his immediate departure would have a serious effect upon the patient.

b. Extreme community hardship. In general, this requirement will be met only when all of the following conditions are determined to exist:

(1) The service performed by the reservist is essential to the maintenance of health, safety, or welfare of his community.

(2) The service cannot be performed by other persons residing in the area concerned.

(3) The reservist cannot be replaced in the community by another person who can perform such services."

"3-11. Action on requests for delay or exemptions.

a. Requests will be considered only upon written application submitted by the member concerned. Requests which do not contain the complete information, documentary evidence, and other required data will be returned to the individual with specific indication of the additional information desired."

"3-14. Action by area commanders and CO, USAAC, and CO, USARCPC. The commander having responsibility for the administration of delay and exemption procedures over USAR members under their jurisdictional control will take the actions outlined below on requests for delay or exemption submitted by such members.

a. Notify the reservist of the decision rendered on request for delay or exemption.

b. When the request is denied, notify the member of such denial and reason therefor, together with his right to appeal such decision."

"3-15. Appeals.

a. General. Appeals for reconsideration of denial of requested delay or exemption may be considered when the member can furnish additional evidence which may warrant further review of his original request. When the basis of the appeal is for reasons other than furnished in the original request, such requests will be processed as an initial request for delay or exemption.

APPENDIX B

[JUDGMENT AND PROCEEDINGS BELOW]

Opinion of the United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 572—September Term, 1967.

(Argued July 22, 1968 Decided November 7, 1968.)

Docket No. 32505

UNITED STATES OF AMERICA *ex rel.*
STEPHEN F. SCHONBRUN,

Appellant,

—v.—

COMMANDING OFFICER, ARMED FORCES or the SECRETARY OF THE ARMY, or his Agents and/or Servants or the COMMANDING OFFICER, COMMANDING GENERAL or His Designee, FIRST ARMY DISTRICT, Fort Wadsworth, Staten Island, New York,

Appellee.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and HAYS, *Circuit Judges.*

Appeal by a reservist called to active duty despite his claim of extreme personal and community hardship from an order of the District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* denying a writ of habeas corpus. Affirmed.

BERNARD ROSENBLOOM, New York, N. Y., *for Appellant.*

RALPH A. BONTEMPO, Ass't U. S. Attorney (Joseph P. Hoey, United States Attorney for the Eastern District of New York), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Stephen Schonbrun, a member of the Army Reserves, has sought a writ of habeas corpus releasing him from an order to report for active duty.

Schonbrun enlisted in the reserves on July 28, 1963, and is now a member of the 203d Transportation Company. The unit was activated on May 13, 1968. Anticipating this, in late April he wrote two letters to his Commanding Officer seeking exemption from active duty pursuant to Army Regulations because of extreme personal and community hardship.[1] As to "extreme personal hardship," he submit-

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1 The applicable provisions of Army Regulation 601-25 are:

"3-2. Delay and exemption policies.

. . . b. . . . (3) . . . Delay or exemption of all Ready reservists, other than those described in (1) and (2) above, is authorized in accordance with either of the following criteria:

(a) In exceptional cases when the involuntary order to active duty will result in an extreme personal or community hardship (para. 1-12);

* * * * *

"1-12. Criteria for hardship conditions.

a. Extreme personal hardship.

"(1) Illness of a member of immediate family. When, in the opinion of the attending physician, the illness of the member is such that—

(a) Fatality appears to be imminent;

or

(*continued on following page*)

ted that his wife was suffering from a psychiatric disorder, that his presence in the household materially aided her and tended to promote her recovery, and that his departure would have a serious and immediate deteriorating effect. Two psychiatrists and a psychologist attested the seriousness of her ailment; one of the psychiatrists and the psychologist confirmed the likelihood that Schonbrun's departure would have a harmful effect. Further confirmation was afforded by a letter from the Rabbi of the Schonbruns' synagogue and by a Lutheran pastor. The case for "extreme community hardship" was that Schonbrun had been teaching a class of 10 severely disturbed boys in a Special Service School located in a poverty area in Queens, with

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(b) Presence of the reservist is an important factor in the recovery of the patient and his immediate departure would have a serious effect upon the patient.

* * * * *

"b. Extreme community hardship. In general, this requirement will be met only when all of the following conditions are determined to exist:

(1) The service performed by the reservist is essential to the maintenance of health, safety, or welfare of his community.

(2) The service cannot be performed by other persons residing in the area concerned.

(3) The reservist cannot be replaced in the community by another person who can perform such services.

* * * * *

"3-11. Action on requests for delay or exemption.

* * * * *

(c) Requests for delay or exemption submitted on the basis of extreme personal or community hardship—

(1) May be considered when the extreme personal or community hardship condition occurs not more than 6 months prior to receipt of alert or active duty orders.

(2) May not be considered when such hardship condition existed at the time applicant submitted DA Form 1140-1 (Army Reserve Status Verification Questionnaire) as prescribed in AR 140-25, whichever is the more recent, and applicant failed to request transfer from the Ready Reserve by reason of hardship."

great success. His value there was attested by the Principal of the school, the Assistant Principal, and the Social Studies Chairman.

On May 6 Schonbrun was given a 30-day extension and was told to contact Fort Wadsworth for further instructions before this expired. While not officially notified, he learned that his application had been denied. He claims this was without assignment of reasons, although Army Regulations 601-25, 3-14, require that when the area commander denies the request, he must "notify the member of such denial and the reason therefor, together with his right to appeal such decision." Schonbrun appealed, submitting additional letters from the President of the Parents' Association of the School and the Chairman of the Permanent Coordinating Committee of the Permanent Coordinating Council of Jamaica, N. Y., and a further letter from his wife's psychiatrist. He was notified that the appeals board had denied this on the ground that "the case did not meet the criteria for exemption from involuntary call to active duty as established in AR 601-25." An application for reconsideration offering additional evidence and questioning the methods and procedure of the appeals board proved fruitless, and Schonbrun was ordered to report for active duty.

He then began this proceeding for habeas corpus in the District Court for the Eastern District of New York. Judge Weinstein denied the application. On the community aspect, he said that the weighing of hardship to the community in losing the reservist and of hardship to the United States in losing his service on active duty was "peculiarly the kind of decision that must be made by the military." On the personal aspect he thought this was "not a matter peculiar to this reservist" since "to a lesser or greater degree wives and families of those who are called into the

Armed Services suffer great hardship." After granting a re-hearing to take further evidence, the nature of which does not appear, he adhered to his decision and dismissed the writ. This court granted a stay pending appeal.

The jurisdiction of the district court to grant a writ of habeas corpus is governed by 28 U. S. C. §2241, which makes the writ available only when a petitioner is "in custody." The statute "does not attempt to mark the boundaries of 'custody,'" and courts have long recognized that "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient . . . to support the issuance of habeas corpus." *Jones* v. *Cunningham,* 371 U. S. 236, 238-49 (1963); see also *Peyton* v. *Rowe,* 391 U. S. 54 (1968). Decisions make clear that Schonbrun's status as a member of the armed forces imposes such a restraint on his liberty. *Jones* v. *Cunningham, supra,* 371 U. S. at 240; *U. S. ex rel. Altieri* v. *Flint,* 54 F. Supp. 889 (D. Conn. 1943), aff'd on opinion below, 142 F. 2d 62 (2 Cir. 1944); *Hammond* v. *Lenfest,* 398 F. 2d 705, 710-12 (2 Cir. 1968); see R. Sokol, A Handbook of Federal Habeas Corpus §5.3 (1965). An inquiry into the legality of this restraint would be within the traditional function of the writ.

Schonbrun does not seek, however, to be discharged from membership in the armed forces. He has enlisted voluntarily in the Army and concedes its continued jurisdiction over him; he challenges only the order requiring him to report for active duty. He differs in this respect from one who seeks to be discharged entirely from the military, as in *Orloff* v. *Willoughby,* 346 U. S. 83 (1953), and *Hammond* v. *Lenfest, supra,* or who challenges the validity of imprisonment under court-martial proceedings, cf. *Burns* v. *Wilson,* 346 U. S. 137 (1953). Generally habeas corpus is

available only to a petitioner who is entitled to release from unlawful restraint, and is not a means of testing the conditions of admittedly lawful custody. *Application of Hodge,* 262 F. 2d 778 (9 Cir. 1958); *Harris* v. *Settle,* 322 F. 2d 908 (8 Cir. 1963), cert. denied, 377 U. S. 910 (1964); *U. S. ex rel. Knight* v. *Ragen,* 337 F. 2d 426 (7 Cir. 1944). On the other hand, habeas corpus will lie to test the legality of a change from probation or parole to imprisonment. *Ex parte Hull,* 312 U. S. 546 (1941); *Mempa* v. *Rhay,* 389 U. S. 128 (1967) [state habeas]; *Arketa* v. *Wilson,* 373 F. 2d 582, 584 (9 Cir. 1967). Arguably a transfer from reserve status to active duty is attracted by the analogy of this latter line of cases rather than the former, although a change in duty assignments of a soldier or sailor in active service would not be. Yet to hold that habeas lies in such a case would require a rather close distinction of the decisions that it is not available to a selective service registrant before induction. See *DeRozario* v. *Commanding Officer,* 390 F. 2d 532, 535-36 (9 Cir. 1968), and authorities there cited.

Whether or not habeas corpus is available, the district court was free to treat the petition as one for mandamus under 28 U. S. C. §1361, which vests the district court with "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Schonbrun makes no claim that the Army has not acted "within its jurisdiction under valid law." See *Winters* v. *United States,* 281 F. Supp. 289, 299 (E. D. N. Y.), aff'd, 390 F. 2d 879 (2 Cir. 1968); *Fox* v. *Brown,* —— F. 2d —— (2 Cir. 1968) (Lumbard, *C. J.,* concurring); his complaint is of an abuse of discretion in denying his request for an exemption. The committee re-

ports recommending enactment of 28 U. S. C. §1361 made clear that the courts were "not to direct or influence the exercise of discretion of the officer or agency in the making of the decision," see 2 U. S. Code Cong. & Adm. News, 87th Cong. 2d Sess., 2784-85 (1962), and the statute has been so construed, *Smith* v. *United States*, 333 F. 2d 70 (10 Cir. 1964). We recognize that, despite this, official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted. See Jaffe, Judicial Control of Administrative Action 181-82 (1965); Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 333-35 (1967). But the necessity for expedition in the military's administration of personnel admittedly subject to its jurisdiction raises a serious question whether the courts should apply this principle with respect to a call-up order, and if that be the correct result in mandamus, the result should not be different even if habeas or an injunction are also available remedies. Contrast *Wong Wing Hang* v. *I. N. S.*, 360 F. 2d 715, 717-18 (2 Cir. 1966).

The very purpose of a "ready reserve" is that the reserve shall be ready. Under the regulations, delay or exemption from active duty in hardship cases is authorized but not required. The hardship must be "extreme," and while the regulations wisely give more specific content to this criterion, a good deal is necessarily left to the judgment of the commanding officer. In contrast to the yea or nay character of entitlement to the conscientious objection exemption, administration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from

time to time and from place to place in a manner beyond the competence of a court to decide. While no one could reasonably assert that the country would perish if Schonbrun did not serve with his company, delay in the call-up of a reservist, even during the period necessary for judicial consideration of his claim to discretionary exemption, inevitably means either a gap in the unit or the call of another reservist who otherwise might not have been reached. Although Schonbrun's case is appealing, especially his personal hardship claim which was scarcely disposed of by the comment of the district judge, the courts must have regard to the flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces. We conclude that this is a subject on which civil review of discretionary action by the military should be declined—and this irrespective of the rubric under which the action is brought.[2]

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2 The extent to which the Administrative Procedure Act applies to actions of the military is far from clear. Section 4, which governs rulemaking, excludes "any military, naval or foreign affairs function of the United States," and §5, which deals with adjudication, exempts "the conduct of military, naval or foreign affairs functions." However, the breadth of the definition of "agency" in §2(a) indicates that the "agency action" of which §10 speaks embraces far more than adjudication and rulemaking. "Agency" appears to include the military, except "courts martial and military commissions," "military or naval authority exercised in the field in time of war or in occupied territory," and the Selective Service System. Thus, the call up of reservists would seem to be subject to the provision of §10 that, except so far as "statutes preclude judicial review" or "agency action is by law committed to agency discretion," judicial review shall be afforded to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute." Our holding here that the correctness of a discretionary refusal to grant the hardship exemption is not subject to review by the courts necessarily represents a determination that such a refusal

While the Army's alleged violation of its own regulations, in failing to give notice of denial of his initial request and the reasons for it, might stand differently, Schonbrun was not prejudiced thereby.

Affirmed.

"is by law committed to agency discretion" so far as to render inapplicable the provisions of §10(e). See 4 Davis, Administrative Law Treatise §28.16, especially pp. 81-82 (1958).

Opinion of the United States District Court, Eastern District

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 68-C-671

UNITED STATES OF AMERICA, *ex rel.*,
STEPHEN F. SCHONBRUN,

Petitioner,

—v.—

COMMANDING OFFICER, ARMED FORCES *et al.*,

Respondents.

July 1, 1968

HON. JACK B. WEINSTEIN, *U.S.D.J.*

It seems to me . . . that this case falls within the warning given in the majority opinion (*Hammond* v. *Lenfest*, decided June 10, 1968) with reference to judicial hesitancy when faced with matters touching on military affairs . . . the case you present to me represents almost in classic form the kind of situation where a writ of habeas corpus should not be granted, in my opinion.

There are two grounds in your papers, first the great hardship to the community. And for purposes of your application I assume that what is said is accurate. It is supported by substantial documentation of people in the educational community. But the weighing of the hardship to the local community and the hardship to the United

States in calling up of reservists is peculiarly the kind of decision that must be made by the military. This Court cannot know and there is nothing in the papers to indicate how badly this reservist and members of his class generally are needed at the present time.

So far as the second ground given, the great emotional stress of his wife should he be called up, that is again not a matter peculiar to this reservist. To a lesser or greater degree wives and families of those who are called into the Armed Services suffer great hardship. This is a matter again that the government, through its Armed Forces authorities must consider. If this Court were to interject itself into every call up of a reservist because of factors of this kind, it might well disrupt the entire reservist structure. We do know and take judicial notice of the fact that many reservists who are going to be called up are suffering great hardship. Many of them have to give up their businesses. Many of them have young children who are going to be seriously affected. In many instances they made commitments with respect to homes and other things. I cannot on the basis of the substantive claims you make see any warrant for the Courts of this Country interfering with the call up of these reservists.

The third point you make in your papers applies to due process within the military establishment. Again the very nature of a reservist serving in a unit such as the petitioner requires in cases of national emergency that he be called up rapidly and without a great deal of adjudication within the Service.

The President has indicated that a national emergency requires the calling up of the reserves. I cannot second guess his decision in that respect and I will not do so.

Therefore taking all of your allegations in your moving papers and all of the statements in support of those moving papers at face value, and assuming that everything you say is correct, it seems to me you have not made out a sufficient case for the issuance of a writ of habeas corpus.

It seems to me undesirable therefore for me to sign the order to show cause requiring the Government to appear. It seems further undesirable for me to stay the operation of the reservist system in the case of this petitioner as requested. It is therefore my intention to deny your petition for an order to show cause. If you wish you can then move promptly in the Court of Appeals. A full transcript is being taken. I am certain that in view of the emergency nature of the situation, if you request it, a transcript can be quickly prepared for you. . . . The petition is denied in all respects.

So ordered.

I am moving very quickly on this so that you can pursue your appellate rights if you have any.

I do not want to hold it. There is no point in my holding a hearing because I assume the truth of all the statements that you make.

Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68-C-671

UNITED STATES OF AMERICA, *ex rel.*,
STEPHEN F. SCHONBRUN,

Petitioner,

—vs.—

COMMANDING OFFICER, ARMED FORCES OR THE SECRETARY OF THE ARMY, OR HIS AGENTS AND/OR SERVANTS, OR THE COMMANDING OFFICER, COMMANDING GENERAL OR HIS DESIGNEE, FIRST ARMY DISTRICT, Fort Wadsworth, Staten Island, New York,

Respondent.

ORDER TO SHOW CAUSE FOR THE ISSUANCE OF A WRIT OF HABEAS CORPUS

This cause having come on for consideration on petition for a writ of habeas corpus, and the Court having denied the said petition under date of July 1, 1968, and a rehearing having been granted on oral application to present new evidence, and such new evidence having been heard on July 2, 1968,

It is ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of the respondents, dismissing the petition for a writ of habeas corpus.

Dated at Brooklyn, New York, this 2nd day of July, 1968.

/s/ JACK B. WEINSTEIN
U.S.D.J.

APPENDIX C

[Exhibits Admitted Into Evidence in District Court Proceedings]

EXHIBIT A

42-37 Union Street
Flushing, New York 11355

Commanding Officer
203rd Transportation Company
605 Stewart Avenue
Garden City, New York 11530

Dear Sir:

I request exemption from active duty on grounds that the loss of my services would create a situation of extreme hardship upon the community of South Jamaica.

I am presently teaching a sixth grade class of emotionally disturbed children, and have been since February, in Junior High School 142, Jamaica, N. Y. These children have improved greatly in all areas of educational and social adjustment. My loss to the children would impair continued progress because of the discontinuation of the educational atmosphere created by my interaction with the children. Regression could very likely occur because the children wouldn't understand the situation demanding my removal. They would lose confidence in the willingness and ability of teachers to satisfy their peculiar wants.

The shortage of trained teachers, coupled with the needs of my class of emotionally disturbed children, would mean

that my loss before June 30, 1968 would create an eventuality of extreme community hardship.

Teacher programs have already been planned for the next school year. These plans include my teaching a class of emotionally disturbed children. I have assisted in drawing up the curriculum to be used the next school year, and planned to confer with other teachers toward its implementation. Interdepartmental conferences have already yielded substantial gains in other classes.

Junior High School 142 is a Special Service school. It is located in an underprivileged community, and its students require the highest quality education that is possible. It is a regrettable fact that many teachers leave the school to teach in areas where the problems and challenges of educating children are not as great. Few teachers request assignment in a school located in an area such as ours.

It is not accidental that the learning atmosphere has improved in my class since February. Study, preparation and the patience of the teacher are necessary ingredients to a successful learning situation. Understanding and faith that the children can achieve in school are transmitted to the children. They in turn better understand and acquire faith in themselves.

My close contact with the parents of the children in my class has led them to see the benefits of quality education. The principal of our school, Mr. Butti, and all other administrators, also appreciate the improvements shown by my students. I am sure that the parents and the administrators agree that my loss to the school would be irreplaceable in view of the special needs of emotionally disturbed children in a community such as South Jamaica.

For all the reasons given before, I request exemption from involuntary active duty on grounds that my activation would cause extreme hardship to the community. Thank you for your consideration.

Sincerely yours,

/s/ Stephen F. Schonbrun

PFC Stephen F. Schonbrun ER12687400
203rd Transportation Company
42-37 Union Street
Flushing, New York 11355

On this 25th day of April 1968, before me personally came PFC Stephen Schonbrun, known to me to be the said Stephen Schonbrun, and stated to me that he executed the above statement.

/s/ Joshua L. Sussman
Notary Public, State of New York
Queens County #41 9252855
Term Expires 3/30/70

(Letterhead of The Edgar D. Shimer Junior High School No. 142, Queens, Linden Blvd. & 142nd Street, Jamaica, New York 11436)

EXHIBIT B

April 23, 1968

Commanding Officer
203rd Transportation Company
605 Stewart Avenue
Garden City, New York 11530

Dear Sir:

Stephen Schonbrun, # ER 12687400, is presently employed in our school as a teacher of a special class of emotionally disturbed children. He has been teaching this class since February, 1968.

Shimer Junior High School is a Special Service School, so designated because it is located in an underprivileged neighborhood. The student population is virtually 100% Negro. Educators recognize the importance of experienced, dedicated teachers in order to satisfy the special educational and social needs of such children as comprise our student population.

Mr. Schonbrun has demonstrated his skill and dedication in teaching emotionally disturbed children. Since February the children have made major educational and social progress. Some of the children in his class have been successfully placed into "normal" classes due to this progress. These children had long histories of asocial behavior.

The loss of Mr. Schonbrun would be injurious to the mental and educational well-being of his students. We fear the progress his class has shown will be lost. He is absolutely irreplaceable as a teacher of his class of emotionally disturbed children. For this reason he is essential to the school until the end of the school year, June 30. His loss would constitute an extreme community hardship.

Mr. Schonbrun has been included in our plans for the next school year as teacher of emotionally disturbed children. It is essential to our program that he be available to teach in Shimer Junior High School.

We face greater problems recruiting trained, dedicated personnel than is obvious, even with a national teacher shortage. We are constantly drained of our experienced teachers who seek employment in other schools in the suburbs or more privileged neighborhoods. Very few teachers remain long in schools such as ours, where the educational needs of the children require dedication and experience. Far fewer are experienced and so greatly dedicated to the teaching of emotionally disturbed children, as is Mr. Schonbrun.

For the reasons mentioned, Mr. Schonbrun is not only irreplaceable to our school this school year, but for the future years as well. In these troubled times, it is of utmost importance that quality education be had by emotionally disturbed children of underprivileged background. These children, whose histories reflect unsocial behavior and instability, are potential social liabilities unless proper and intensive guidance be given them. It is precisely at Junior High School age, where the experience and dedication of a teacher as Mr. Schonbrun is so important.

We consider a possible loss of Mr. Schonbrun to be an extreme community hardship. We therefore urge that he be exempted from involuntary active duty, to the best interest of all concerned.

Sincerely yours,

/s/ Lewis C. Butti

Lewis C. Butti
Principal

LCB/hr

(Letterhead of The Edgar D. Shimer Junior High School No. 142, Queens, Linden Blvd. & 142nd Street, Jamaica, New York 11436)

EXHIBIT C

April 23, 1968

Commanding Officer
203rd Transportation Company
605 Stewart Avenue
Garden City, N. Y. 11530

Dear Sir:

I have read the statement of Mr. Butti, Principal of Shimer Junior High School, and agree with his reasons for request of exemption from involuntary active duty for Mr. Schonbrun.

I have observed Mr. Schonbrun's classes many times since February. From the start Mr. Schonbrun has displayed the skill, dedication, and compassion necessary for the teaching of emotionally disturbed children. His efforts have been rewarded by the great improvement of the children in all areas necessary for successful social living.

It would be impossible to describe the changes in our Class 6-12 since Mr. Schonbrun became their teacher. The highly emotional personalities of the children have been quieted by Mr. Schonbrun's calm demeanor. The children responded to Mr. Schonbrun's teaching methods with enthusiasm and interest. A nearly ideal learning situation has replaced a situation void of possibilities for real learning.

It would indeed be an irreplaceable loss should Mr. Schonbrun not be exempted from involuntary active duty. Extreme hardship to the community, and the emotionally disturbed children, would certainly exist. I request his exemption for the best interests of all concerned.

Sincerely,

/s/ MARTIN COHEN

Martin Cohen
Social Studies Chairman

MC:md

(Letterhead of The Edgar D. Shimer Junior High School, No. 142, Queens, Linden Blvd. & 142nd Street, Jamaica, New York 11436)

EXHIBIT D

April 24, 1968

Commanding Officer
203rd Transportation Company
605 Stewart Ave.
Garden City, N. Y. 11530

Dear Sir:

Plans for next year have been made to include Mr. Schonbrun in our program for emotionally disturbed children. The extraordinary progress made by his class has raised our level of expectation toward the education of the emotionally disturbed child. Mr. Schonbrun, the principal, Mr. Butti, and I plan the curriculum for these children. We use many of Mr. Schonbrun's suggestions on a department wide basis. Together we are planning curriculum for our children for next year's programs.

The loss of Mr. Schonbrun would be a serious blow to our future programs for the emotionally disturbed child. His enthusiasm, dedication, and talents are essential to our optimistic hopes for educational fulfillment of our emotionally disturbed children.

Ours is a community already showing signs of discontent. The lack of opportunity for its citizens creates a situation not unlike others we've known in other underprivileged communities. Positive measures are necessary to eliminate the community discontents. The loss of Mr. Schonbrun

would certainly create a community hardship, the kind this community cannot afford.

I concur with Mr. Butti that Mr. Schonbrun should be exempted from involuntary active duty on the grounds that his loss would constitute an extreme hardship to the community.

Very truly yours,

/s/ DESIREE E. GREENIDGE

Desiree E. Greenidge,
Assistant Principal

DEG/jc

EXHIBIT E

April 25, 1968

Commanding Officer
203rd Transportation Company
605 Stewart Avenue
Garden City, New York 11530

Dear Sir:

I request exemption from involuntary active duty on grounds of extreme personal hardship.

I base my request on the knowledge that absence from my wife, Marlene Schonbrun, would gravely endanger her health and safety. She is psychologically unable to cope with the thought of my absence. I must constantly reassure her that nothing will happen to endanger our relationship or our lives due to my activation. In spite of my reassurances, Marlene continually threatens suicide. She states that she must have me with her in order to go on living.

Psychological difficulties first began in late November 1967. After a period of unemployment, Marlene took a job as a secretary. She worked one day and refused to work thereafter for no apparent reason. This was peculiar in view of the fact that we needed the extra money. It was peculiar also because Marlene had usually held her jobs for periods of at least one year.

I asked Marlene to see a psychiatrist, Dr. Cronson. She visited him one time despite the fact that he recommended that she return, and in spite of my requests to continue seeing the doctor.

In December, after an argument in which I left the house, Marlene thought that I had left for good and swallowed aspirins in a suicide attempt. When I returned two hours later she was lying passively on our bed. When I asked what was the matter she said, "You'll see". Finally she told me she had swallowed the remaining contents of an aspirin bottle. She hadn't known that the amount left would only cause a person to have an upset stomach. I knew this because I have a serious sinus condition, and had just taken aspirins that evening. I told her to remain lying down. I assured her that I wouldn't leave her, and that I had left the house in order to regain my composure and not cause more argument.

Increasingly, since that time, Marlene has stated her dependency on me. Previously she had always prided herself on her independent character. Now she is often been depressed, talking of me leaving her, not loving her, eventual serious illnesses and death. I have tried to reassure her as best I could, and for the most part, I succeed temporarily in allaying her fears.

Despite her resistance to psychiatric care, her increasing depressions and my continued pleas finally convinced her to seek again psychiatric help.

Dr. Drucker, Marlene's present psychiatrist, is very concerned about Marlene's emotional stability. When I received my alert notification and informed him of it, he viewed the possibilities dimly. He realizes, as I do, that in her present state, my wife's health and safety are jeopardized.

Please consider my request for exemption carefully. It is of the utmost importance to my wife's life, and all who are near to her.

Thank you.

/s/ PFC STEPHEN F. SCHONBRUN, ER12687400

PFC Stephen F. Schonbrun, ER12687400
203rd Transportation Company
42-37 Union Street
Flushing, New York 11355

Sworn to before me
this 29 day of April 1968.

JAMES A. HEFFERNAN
Notary Public, State of New York
No. 31- (Illegible)
Qualified in New York County
Certs. filed with N. Y. County Clk. & Sur.
Commission Expires March 30, 19 (Illegible)

EXHIBIT F

MARVIN DRUCKER, M. D.
114-20 QUEENS BOULEVARD
FOREST HILLS, N. Y. 11375

PHONE 793-1406

April 25, 1968

To Whom It May Concern:

Mrs. Marlene Schonbrun, age 25, is currently in psychiatric treatment with me. She suffers from an emotional unstable personality disorder with depressive and anxiety features. Prognosis is fair.

The disability became apparent approximately in November, 1967 when she sought psychiatric consultation from another psychiatrist because of severe difficulty in her work situation. Treatment was advised at that time. In December, 1967 Mrs. Schonbrun made a suicide attempt by ingesting Aspirin tablets. There is a long history of difficulty in work situations.

Mrs. Schonbrun began psychotherapy with me in April, 1968. There is a mixture of depressive and anxiety elements present. She is extraordinarily dependent on her husband in what appears to be a relatively stable marriage. She has considerable difficulty functioning without constant emotional support from him. In my opinion, prolonged separation from her husband because of military service could well result in a further decompensation and production of a psychotic depression, the consequences of which might be quite serious in view of the prior history. It is too early to evaluate the effect, if any, of treatment

but I would not expect the situation to change in a period of less than a year.

Very truly yours,

/s/ Marvin Drucker

Marvin Drucker, M.D.
Diplomate
American Board of Psychiatry
and Neurology

MD:el

EXHIBIT G

(Letterhead of Alvin J. Cronson, M. D., 80 Park Avenue, New York, N. Y. 10016)

April 24, 1968

To Whom It May Concern:

Mrs. Stephen Schonbrun consulted me on November 22, 1967 and gave a history of not having been able to work for the previous two and a half months.

The psychiatric history and examination revealed a serious mental illness and intensive psychiatric treatment was recommended. Unfortunately Mrs. Schonbrun was unwilling to be cooperative and did not follow my recommendation.

Truly yours,

/s/ Alvin J. Cronson

Alvin J. Cronson, M.D.

EXHIBIT H

(Letterhead of H. Jon Geis, Ph.D., 175 West 13th Street, New York, N. Y. 10011)

C-O-N-F-I-D-E-N-T-I-A-L

April 27, 1968

Commanding Officer
203rd Transportation Co.
605 Stewart Ave.
Garden City, N.Y.

Re: *Mrs. Stephen Schonbrun*
seen for diagnosis (2 sessions)
April 27, 1968

Dear Sir:

Mr. Stephen Schonbrun called me several days ago, apparently in some distress, to request a diagnostic interview with regard to the emotional stability of his wife, *Marlene Schonbrun*, and its implications if he is required to leave her for active military service.

It is my opinion that if Mr. Schonbrun were to be removed from his wife at the present time there would be the significant possibility of precipitating more serious disturbance than Mrs. Schonbrun currently manifests and also a break-up of the marriage.

Mrs. Schonbrun is an emotionally unstable young woman who is considerably self-blaming, needful, fearful of a variety of things (including being alone: "I feel safe when he is home") extremely neurotic about "losing" her husband, whom she loves very much, and unable to be on her own without extreme anxiety and depression. It is fortu-

nate that she is currently in psychotherapy, which she should have begun some time ago (certainly after her suicide attempt). Her preoccupation with death and losing her husband along with her history of "hating" her work make separation from her husband a risky business at this time, particularly since she appears to have no other resources to fall back upon.

/s/ H. Jon Geis

H. Jon Geis, Ph.D.
N.Y. State Certified Psychologist
License No. PSY003251

CHURCH OF THE HOLY REDEEMER

(Emblem)

A LUTHERAN MISSION

EXHIBIT I

April 26, 1968

Commanding Officer
203rd Transportation Co.
605 Stewart Avenue
Garden City, NY 11350

Dear Sir:

Marlene Schonbrun, wife of Stephen Schonbrun, has privately consulted with me regarding her depressions and fears. Although I am not her pastor, she sought me out through a mutual acquaintance who thought I might be of some help. It's debatable what help I've been, but I do know that this past January she made an attempt on her life out of fear of losing her husband.

The news of his impending duty in the Armed Forces has brought about a notable increase in her depressions. She talks in very fatalistic language be it realistic or not.

Last November Marlene first sought professional psychological assistance. Her depressions have worsened since then and finally she is seeing another psychiatrist regularly.

In view of the mental condition of Marlene, I strong urge that her husband be exempted from duty in the Armed Forces. Separation, or thoughts of separation, endanger

her physically and emotionally. Surely you will consider this most urgent request.

Thank you.

Sincerely,

/s/ Lyle R. Guttu

Lyle R. Guttu

LRG:RG

2424 Linden Blvd., Brooklyn, N. Y. 11208 • (212) 272 9300
Lyle R. Guttu, Pastor

TEMPLE EMANU-EL OF FAR ROCKAWAY

FAR ROCKAWAY, N. Y. 11691

1526 Central Avenue
Granite 1-2888

EXHIBIT J

IRWIN C. LOWENHEIM
RABBI

April 28, 1968

Commanding Officer
203rd Transportation Company
605 Stewart Avenue
Garden City, New York

Dear Sir:

Mr. and Mrs. Stephen Schonbrun are members of my Synagogue, Temple Emanu-El, Far Rockaway, N.Y. I have known of the Difficulties of Marlene Schonbrun since Dec. 1967. Stephen Schonbrun told me confidently that Marlene had attempted suicide. Since that time he has shown increasing concern towards the dependency and depressions of his wife.

I have spoken with Mrs. Schonbrun about this matter. She does show extreme dependency and instability of character. I can not, of course judge suicidal tendencies, but I know that her psychiatrist thinks her condition is very serious.

Service in the army for Stephen would create an extremely grave situation for his wife.

I would recommend that every possible consideration be given to Stephen.

Very Truly Yours,

/s/ IRWIN C. LOWENHEIM
Rabbi Irwin C. Lowenheim

ICL:JL

EXHIBIT K

Commanding General
Attention: AHAAG-CA
First U.S. Army
Fort George G. Meade
Maryland 20755

42-37 Union St.
Flushing, New York 11355

June 6, 1968

Dear Sir:

This is to appeal your denial of my request for exemption from involuntary order to active duty dated 29 April 1968.

I requested exemption in accordance with paragraph 3-8B (2)(B), AR601-25. The basis of my request was personal hardship and community hardship.

I cannot understand the reason for the refusal of my request. I requested exemption of community hardship because I am a teacher of emotionally disturbed children. The school in which I teach is a school in a deprived area, the students being over 95% Negro. The community is very upset because of the physical lack of teachers (there are classes without regular teachers), and the high turnover rate of teachers. The people in the community demand experienced, dedicated teachers for their children. I have been fortunate to be able to fulfill the needs of the children in my classes, and therefore, the needs of the community. This was well documented in my previous request for exemption.

The new evidence of community hardship documents the concern of the community toward the eventuality of my departure. My departure on June 11th means that I cannot fill the needs of the children that I am presently teach-

ing (the end of the term is June 28th). This is a critical period for application of the term's learning and evaluation. The community realizes, as you must, that the loss of a teacher of emotionally disturbed children is a loss to the entire community. I have successfully taught the children in our program for emotionally disturbed children. I am scheduled to continue teaching and planning for the students in this program the next school year. In view of the nation's commitment toward the education and betterment of deprived children, and in view of the community needs, my services are far more needed in my present teaching position than in the United States Army.

I am also appealing the refusal of my request for exemption due to personal hardship. I really don't know how to convince you of the severity of the situation. I had thought the documentation I had sent you previously was sufficient for you to realize how serious this matter was. I would like a hearing or examination of my wife if the new evidence does not seem sufficient to grant my exemption from active duty.

The new evidence shows that, indeed, the problem is very serious. It will require prolonged therapy in order to begin to see improvement.

My wife is very ill. The past month she has been even more depressed because of my scheduled departure. She thinks that going into the Army will mean that I will die, or that I will leave her. The breakup of our present pattern of living will have extremely bad effects. She still threatens suicide if I have to leave her. It does not matter that I tell her that she may be able to live near me. She projects that I will be sent into combat and die, or that I may die under ordinary training circumstances. She also

fears that the change in our living pattern will bring about a change in my love and devotion for her.

My wife is too ill for me to convince her that our marriage will continue. She cannot be reasoned with in this matter. Her psychiatrist has had little success thus far because of the severity of her condition. I fear that if I do go into active duty that her already serious condition will worsen, or that she may even kill herself.

Again, I cannot see how you can overlook the seriousness of this situation. I hope that whatever resources the army has will be used to judge this situation fairly and completely. I am sure that due consideration will cause you to see, as everyone else has, the danger to the health and life of my wife.

Respectfully yours,

/s/ STEPHEN F. SCHONBRUN

Stephen F. Schonbrun
ER 12 687 400

COUNTY OF N. Y.
STATE OF N. Y. } ss.:

Sworn before me this 7th day of June 1968.

/s/ RUTH H. STONE

Ruth H. Stone
Notary Public, State of New York
No. 41-9297600
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1970

EXHIBIT L

PARENTS ASSOCIATION OF EDGAR SHIMER JUNIOR HIGH SCHOOL
Edgar Shimer Jr. H.S.
Linden Blvd. and 142 Street
Jamaica, New York

June 5, 1968

Commanding General
Attention AHAAG—CA
Headquarters First United States Army
Fort George G. Meade, Maryland 20755

Dear Sir:

The Parents Association of Edgar Shimer Junior High School is very concerned with the possible loss of Mr. Stephen Schonbrun from his teaching position. There is no question at all that his loss would be a loss to our community.

Possibly you don't understand the situation in our community. We have a very high turnover rate of teachers in our schools, Shimer Junior High School included. The use of inexperienced, often undedicated teachers, for the purpose of educating our children has very bad effects. The children do not benefit from school as they should. Their full potentials are rarely tapped. The parents in our community are deeply concerned about this problem facing our own children and our children's futures.

Teaching children with emotional problems is a particularly difficult task. This type of position has a particularly high teacher turnover rate. In our community these positions are often unfilled and unwanted. Mr. Schonbrun has

done a wonderful job with his classes of children with emotional problems. His are model classes, especially in view of the problems he must deal with. Mr. Schonbrun has also asked to teach a similar program next year. Not for many years has a teacher volunteered to remain in that particular program in Shimer Junior High School.

The necessary attributes for teaching children with problems are experience, dedication, and ability. Mr. Schonbrun has these qualities. It is implausible, in the light of past experience, that these qualities can be matched. We are not dealing with numbers. We are dealing with children's lives. We know that his loss to the school will have an adverse affect upon the lives of students who will be entering the special programs.

You have never walked into Mr. Schonbrun's classroom. You have never seen the satisfaction of learning upon his children's faces. These are the children that other teachers think "uneducable". Permit us to tell you that his presence is necessary to the health of this community.

Please don't frustrate us in this matter. We have been frustrated far too long in the area of education, as well as other areas. Justice demands that Mr. Schonbrun remain in his teaching position where his services are so essential.

/s/ Oliver Patterson

Pres. Parents Association

EXHIBIT M

June 3, 1968

Commanding General
Attention AHAAG-CA
Headquarters First United States Army
Fort George G. Meade
Maryland 20755

Dear Sir:

The Permanent Coordinating Council of Jamaica, New York requests that Stephen Schonbrun be exempted from active duty in the Armed Forces. The loss of Mr. Schonbrun's services as teacher of emotionally disturbed children in Junior High School 142 would constitute a hardship upon this community.

The Permanent Coordinating Council represents various civic and religious groups in our community. Among these groups are: the South Ozone Park Chamber of Commerce, the St. Clement Pope Church, C.R.E.E.D., Neighborhood Youth Corp., the Jamaica Community Corp., and the New York City Youth Board Research Institute. Other community groups are also involved.

The turnover of teachers in schools in our community represents a major cause of the loss of educational opportunities for our children. Quality education demands experience and dedicated teachers, especially in a Special Service school such as Junior High School 142. Mr. Schonbrun has been praised by administrative personnel and parents for his fine work with emotionally disturbed chil-

dren. His departure can only increase the alienation felt by this community toward the power structure.

Mr. Schonbrun has volunteered to teach emotionally disturbed children next year. Should his service not be available, the children, parents, and ultimately the community would suffer needlessly and unjustly.

Respectfully yours,

/s/ JAMES A. BAILEY

James Baily, Chairman
Permanent Coordinating Committee

EXHIBIT N

(Letterhead of Marvin Drucker, M.D., 114-20 Queens Boulevard, Forest Hills, N. Y. 11375)

June 6, 1968

To Whom It May Concern:

Mrs. Marlene Schonbrun, wife of Stephen F. Schonbrun is in psychiatric treatment with me. She is an emotionally unstable person with marked depressive features. There is a history of suicidal attempt one year ago. She is extremely dependent on her husband. There are currently occasional suicidal thoughts.

In my opinion prolonged separation from her husband would be detrimental to her condition and would very likely result in a deepening of the depression, quite possibly to psychotic proportions with the production of another suicide attempt.

Very truly yours,

/s/ MARVIN DRUCKER

Marvin Drucker, M.D.
Diplomate, American
Board of Psychiatry
and Neurology

MD:el

EXHIBIT O

42-37 Union Street
Flushing, New York 11355

June 21, 1968

Commanding General
Attention: AH AAG-CA
Headquarters United States Army
Fort George G. Meade
Mar- 'and 20755

Dear Sir:

On the 19th day of June 1968, I received a telegram indicating that my appeal was heard and summarily denied. This appeal was a request for an exemption from active duty based on community necessity and personal hardship. I must stringently object to the methods and procedures used in dismissing this appeal. It would appear to me that as a person who is being called to the service of his country that I should be entitled to at least the same standards of procedure that one would receive before any civilian body, agency or tribunal.

It is more than obvious that the minimum standards of due process procedural were not afforded me at any moment during the entire military procedure. I have never been informed as to how I was to proceed, where I was to proceed, or to whom I was to present my appeal. I was never aided or afforded the aid of legal counsel from the Judge Advocate General's office, nor was I presented with a statement of what my rights were with respect to this appeal.

The rules and regulations upon which I was appealing were never presented to me, nor were they made available to me directly or indirectly by any person connected with the Army. I was never informed as to what the standards and decisions were with respect to this appeal. All my communications were done by mail, indirectly, and without fair opportunity to present myself to be questioned or to question any board or panel with respect to this appeal.

I do not know to this date what transpired before the appeal board, what considerations were made, what findings of fact were had, or if any of my rights were protected. I do not know what rules of evidence apply before this body nor have I ever been informed whether the standards are of a preponderance of evidence, fair amount of evidence, substantial evidence that was required of me to be produced such that I may sustain the allegations of my petition.

I have never been advised as to what procedures I am to follow after my appeal has been denied. In substance, I do not know what my legal procedural and constitutional rights are before this body and I cannot visualize that I am less entitled to my constitutional rights as a member of the Armed Forces than I would be as a civilian.

I have never appeared before this body, such that it cannot be said that I had a fair hearing. I have never been advised of my right to have counsel appear before this body and what procedures I was to follow to obtain the advice of competent, military counsel who would have an understanding of the rules and procedure of an appeal of this nature. All my requests have fallen upon the deaf ears of red tape. I do not know what retaliatory action may be taken against me for proceeding even with this matter.

No transcript of any Minutes were ever presented to me with respect as to what was considered, what was stated at the alleged hearing and who was present. It is as if the denial was a foregone conclusion and as the Judge in the old West stated, "We are giving you a good trial, a fair trial, and a high hanging."

I feel truly and strongly that I have presented more than an abundance of credible evidence from independence sources as to both the community necessity for continuing my position in an institution was has been classified by the New York City Board of Education as a Special Service school and with respect to my personal hardship relating to my wife's illness and the medical testimony I have offered to substantiate the need for my presence in the continuation of her emotional stability. Clear evidence from community leaders has been offered as to the necessity of my continuation in the school in question. By any standards of fair play, I have demonstrated through these independent sources that sufficient seriousness exists and that a substantial hardship will occur greater than that encountered by others who are asked to serve on active duty. No reasons are given except a conclusion that I do not meet a standard. What is the basis for this conclusion I do not know. I have never been informed, nor has my inquiry into this ever been respectfully considered.

I am now requesting once more that the Armed Forces reconsider my appeal in the light of constitutional standards of fair play and equity which every citizen has a right to expect. I am requesting:

1) A complete detailed copy of the rules and procedure under which this appeal is determined.

2) The cases and previous decisions and where they may be obtained with respect to the hardships indicated in my appeal.

3) How I may contact legal counsel in the Judge Advocate General Corp. who will aid and advise me in the preparation of this appeal.

4) A fair notice of the appeal and fair hearing of the appeal.

5) Opportunity to be present before the appeal board to present my evidence and testimony and to take the testimony of any officer who is opposing my appeal and what the basis of that opposition is.

6) A transcript of the Minutes of the proceeding under which my appeal was denied. I will pay for the cost of typing of said Minutes.

7) Notice of what procedures are available to me with respect to any further appeals or my rights under Federal law.

These I am told are the minimum requirements which one would be entitled to under the present Federal standards. With due respect I do not see why I should expect less. Pending the termination of this application, I am further requesting a further stay of induction such that I may exercise all my administrative and constitutional rights in the protection of my application in this matter.

In anticipation of your reply, I remain,

/s/ Stephen F. Schonbrun

Stephen F. Schonbrun

cc: His Excellency Lyndon B. Johnson, The President of the United States

The Right Honorable Jacob Javits, U. S. Senator from the State of New York

The Honorable Benjamin S. Rosenthal, Member of the House of Representatives of the Congress of the United States

To the Office of the Secretary of the Army of the United States

Commanding Officer, U. S. Army CPC, Fort Benjamin Harrison, Indiana

Commanding Officer First Army headquarters, U. S. Army, Fort Wadsworth, Staten Island

Legal Redress Committee, Jamaica Chapter of the NAACP

(Letterhead of Department of the Army, Headquarters, First United States Army, Fort George G. Meade, Maryland 20755)

AHAAG-CA 25 June 1968

EXHIBIT P

Mr. Schonbrun
42-37 Union Street
Flushing, New York 11355

Dear Mr. Schonbrun:

This is in reply to your letter of 21 June 1968.

Your appeal was ruled on by Department of the Army and was not favorably considered. All decisions by Department of the Army are final and no further appeals are authorized. Accordingly your request for further delay is not favorably considered and you will comply with previous instruction from this headquarters to report for active duty.

Sincerely,

/s/ R. L. King

R. L. King
2LT, AGC
Asst AG

(Letterhead of Department of the Army, Headquarters, First United States Army, Fort George G. Meade, Maryland 20755)

AHAAG-CA 19 Jun 1968

EXHIBIT Q

Honorable Benjamin S. Rosenthal
House of Representatives
Washington, D. C. 20515

Dear Mr. Rosenthal:

This is in reply to your letter in behalf of Private First Class Stephen F. Schonbrun, United States Army Reserve.

A member of a Reserve unit that has been ordered mobilized is required to serve on active duty with his unit except when there is substantial personal or community hardship. The hardship conditions must be of a nature that can be materially relieved only by the individual's delay or exemption from active duty. These conditions must also be of sufficient seriousness that a substantial hardship will occur normally greater than that encountered by others who are asked to serve on active duty. Delays for national health, safety and interest are made only where the critical need for the services of the individual in a civilian capacity of critical national or community interest clearly outweighs the need for the individual in an active military status.

A board of senior officers has carefully considered Private Schonbrun's request and has determined that the evidence does not support approval of his request. However, in or-

der to provide Private Schonbrun with an opportunity to settle his personal affairs, he has been granted a delay from entering active duty for a period of fifty days. Since Private Schonbrun decided to appeal this decision, his application was forwarded to Headquarters, Department of the Army for final review. Information obtained from Headquarters, Department of the Army reveals that Private Schonbrun's appeal has not been favorably considered. Private Schonbrun has been advised of this decision.

Your interest in this matter is appreciated and I regret that a more favorable reply is not possible.

Sincerely,

AARON S. SADOVE
Colonel, AGC
Adjutant General

(Western Union Telegram Form)

713A EDT JUN 18 68 SYA036 SPA108 PC006
USA021/809A GOVT XV PD TDP PWS WJ0109/18 TO

PFC STEPHEN F SCHONBRUN EXHIBIT R
42-37 UNION ST FLUSHING NY

P 171550Z JUN 68 UNCLAS 1332 SUBJECT FELAY AND EXEMPTION IN CALL TO ACTIVE DUTY 1. REFERENCE IS MADE TO YOUR LETTER TO THE HONORABLE LYNDON B JOHNSON, PRESIDENT OF THE UNITED STATES, CONCERNING REQUEST FOR EXEMPTION. 2. A MESSAGE WAS DISPATCHED ON 17 JUNE 68, THAT YOUR REQUEST FOR EXEMPTION WAS DISAPPROVED. THE DA D&E BOARD RECEIVED YOUR CASE ON 13 JUNE 68. ON 14 JUNE 68 YOUR CASE WAS CONSIDERED BY THE BOARD. THE FINDINGS OF THE BOARD WAS THAT THE CASE DID NOT MEET THE CRITERIA FOR EXEMPTION FROM INVOLUNTARY CALL TO ACTIVE DUTY AS ESTABLISHED IN AR 601-25. 3. YOU WILL BE ADVISED TO REPORT TO YOUR UNIT FOR DUTY ON A DATE ESTABLISHED BY FIRST US ARMY. SIGNED, PATRICK F CASSIDY, MAJOR GENERAL, USA, CHIEF OFFICE OF PERSONNEL OPERATIONS FM DA USARCPC OPO FTBENHACRISON IND BT

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1021

STEPHEN F. SCHONBRUN, PETITIONER

v.

COMMANDING OFFICER, ARMED FORCES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. 46–49) are unreported. The opinion of the court of appeals (Pet. App. 37–45) is reported at 403 F.2d 371.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1968. The petition for a writ of certiorari was filed on February 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

335-644—69

QUESTION PRESENTED

Whether the courts below properly declined to overturn the refusal of the Army to grant a member of the ready reserves an exemption from active duty on the basis of personal and community hardship.

STATUTES AND REGULATIONS INVOLVED

10 U.S.C. 271; 10 U.S.C. 673; 32 C.F.R. 125.3; 32 C.F.R. 126.3; Army Regulation 601–25 are set forth in the Appendix, *infra*, pp. 7–12.

STATEMENT

Petitioner enlisted in the Army reserves on July 28, 1963, for six years. Less than one month before his unit was activated in May 1968, he sought an exemption from active duty pursuant to an Army regulation which authorizes such exemption because of "extreme" personal or community hardship. His claim of "extreme personal hardship" was that his wife was suffering from a psychiatric disorder and that her well-being required his presence in the household (Pet. App. 60–62). The claim for "extreme community hardship" was based on the fact that he was teaching a class of ten severely disturbed children in an underprivileged area (Pet. App. 50–52). He was given a 30-day extension while his application was under consideration. Upon learning that his commanding officer had denied his request, petitioner appealed and submitted additional evidence (Pet. App. 71–78). On June 19, 1968, he was notified that the appeals board had denied him an exemption on the ground that he "did not meet the criteria for exemption from in-

voluntary call to active duty as established in AR 601–25" (Pet. App. 40, 87).

When an application for reconsideration (Pet. App. 79–83) was denied (Pet. App. 84), petitioner filed suit for *habeas corpus* in the district court. After two hearings, the district court denied the writ. It accepted petitioner's representations, but concluded that the weighing of the hardship to the community and to his wife as against the needs of the armed forces "is peculiarly the kind of decision that must be made by the military" (Pet. App. 47).

The court of appeals unanimously affirmed.[1] It stated that the "very purpose of a 'ready reserve' is that the reserve should be ready" (Pet. App. 43); that "[a]lthough Schonbrun's case is appealing * * * the courts must have regard to the flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces" (Pet. App. 44); and that "this is a subject on which civil review of discretionary action by the military should be declined" (*ibid.*).[2]

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[1] Although the court expressed some doubt as to whether *habeas corpus* would be available to a reservist challenging an order requiring him to report for active duty as opposed to seeking a discharge, it recognized that the district court "was free to treat the petition as one for mandamus under 28 U.S.C. 1361" (Pet. App. 42) and therefore reached the merits.

[2] On December 23, 1968, Mr. Justice Harlan denied petitioner's application for a stay of the court of appeals' mandate, and on January 13, 1969, the full Court (Mr. Justice Douglas dissenting) denied reconsideration. The Army has advised that petitioner entered on active duty on March 4, 1969.

ARGUMENT

Petitioner voluntarily enlisted in the ready reserve and does not challenge the activation of his unit. He claims only that the Army should have exempted him from the call to active duty because of alleged extreme community and personal hardship. As both courts correctly held, however, that is a determination that peculiarly calls for and thus lies within the expert judgment of the military authorities, since it requires balancing the asserted community and personal hardships which would result from the individual reservist's entry on active duty against the needs of the armed forces—an evaluation that must consider, among other things, the reservist's place in the integrated functioning of his unit.

This case is thus different from *Hammond* v. *Lenfest*, 398 F. 2d 705 (C.A. 2), and *United States ex rel. Mankiewicz* v. *Ray*, 399 F. 2d 900 (C.A. 2), upon which petitioner relies (Pet. 9–15). Those cases involved reservists who sought to be discharged on the ground they were conscientious objectors and did not present the problem of balancing the needs of the military against claimed hardship to an individual reservist and the community. As the court of appeals explained the distinction (Pet. App. 43–44):

> In contrast to the yea or nay character of entitlement to the conscientious objection exemption, administration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide.

The court of appeals correctly recognized that the proper utilization of men who have voluntarily joined the military forces requires that this balancing be left to the sound discretion of the military. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 92–95.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
RALPH A. FINE,
Attorneys.

MARCH 1969.

[3] Although petitioner contends (Pet. 16–24, 25–27) that the Army committed various procedural errors in denying petitioner's claim for exemption from active duty, the short answer is that the court of appeals found (Pet. 45) that the alleged errors had not prejudiced him, and he makes no showing here of any actual prejudice.

APPENDIX

10 U.S.C. 271. Ready Reserve: continuous screening.

Under regulations to be prescribed by the President, each armed force shall provide a system of continuous screening of units and members of the Ready Reserve to insure that—

* * * * *

(5) members whose mobilization in an emergency would result in an extreme personal or community hardship are not retained in the Ready Reserve.

10 U.S.C. 673. Ready Reserve.

(a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months.

(b) To achieve fair treatment as between members in the Ready Reserve who are being considered for recall to duty without their consent, consideration shall be given to—

(1) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;

(2) family responsibilities; and

(3) employment necessary to maintain the national health, safety, or interest.

The Secretary of Defense shall prescribe such policies and procedures as he considers necessary to carry out this subsection. He shall report on those policies and procedures at least once a year to the Committees on Armed Services of the Senate and the House of Representatives.

* * * * *

32 C.F.R.:

§ 125.3 Regulations for screening the Ready Reserve.

Screening of the Ready Reserve shall be conducted in accordance with the provisions of Section 271, Title 10, United States Code.

* * * * *

(b) *Extreme hardship.* Members of the Ready Reserve whose call to active duty in an emergency would result in extreme personal or community hardship as defined by the Secretary of Defense shall, upon request, be transferred to the Standby Reserve. Reservists shall be informed of the following definitions of hardship:

(1) *Extreme personal hardship.* An individual desiring transfer from the Ready Reserve to the Standby Reserve must establish by documentary evidence that his dependents would, by his call to active duty in an emergency, suffer extreme hardship greater than that which dependents of other Reservists can be expected to experience from the Reservist's order to active duty. In order to insure a uniform standard, the criteria established by the Service should conform generally with current Selective Service regulations on extreme hardship deferment. In those cases where the reservist is registered with Selective Service, documentary evidence may include a recommendation by the State Director of Selective

Service of the State in which the registrant's Local Board is located. Requests for consideration under this paragraph must be initiated by the Reservist or by his dependents.

(2) ***Extreme community hardship.*** An individual desiring transfer from the Ready Reserve to the Standby Reserve must establish by documentary evidence that his withdrawal from the community in a national emergency would have a substantially adverse effect on the health, safety or welfare of the community. In those cases where the reservist is registered with Selective Service, documentary evidence may include a recommendation by the State Director of Selective Service, of the State in which the registrant's Local Board is located. Requests for consideration under this paragraph must be initiated by the Reservist.

* * * * *

PART 126—READY RESERVISTS INVOLUNTARILY ORDERED TO ACTIVE DUTY: DELAY, EXEMPTION, AND EARLY RELEASE

§ 126.3 Policy.

(a) ***Screening.*** The screening of Ready Reservists will cease when they have been alerted for involuntary order to active duty. Ready Reservists who have been alerted for involuntary order to active duty will continue to be screened in accordance with Part 125 of this Subchapter B.

(b) ***Delay or exemption.*** (1) Ready Reservists who have been alerted for involuntary order to active duty may request delay or exemption if they are—

* * * * *

(iii) Ready Reservists whose involuntary order to active duty would result in an extreme personal or community hardship; or

* * * * *

(3) Request for delay or exemption from a member of the reserve forces involuntarily ordered to active duty will be considered on the merits of the individual case and the requirements of the services concerned. Such requests will be submitted through the military chain of command prescribed by the military departments. Final decision in all cases of appeal is vested in the Secretaries of the military departments concerned or their designated representatives.

* * * * *

Army Regulation 601-25:

3-2. Delay and exemption policies.

* * * b * * * (3) * * * Delay or exemption of all Ready reservists, other than those described in (1) and (2) above, is authorized in accordance with either of the following criteria:

(a) In exceptional cases when the involuntary order to active duty will result in an extreme personal or community hardship (para 1-12);

* * * * *

"1-12. Criteria for hardship conditions.

a. Extreme personal hardship.

(1) Illness of a member of immediate family. When, in the opinion of the attending physician, the illness of the member is such that—

(a) Fatality appears to be imminent; or,

(b) Presence of the reservist is an important factor in the recovery of the patient and his immediate departure would have a serious effect upon the patient.

b. Extreme community hardship. In general, this requirement will be met only when all of the following conditions are determined to exist:

(1) The service performed by the reservist is essential to the maintenance of health, safety, or welfare of his community.

(2) The service cannot be performed by other persons residing in the area concerned.

(3) The reservist cannot be replaced in the community by another person who can perform such services."

3–11. Action on requests for delay or exemptions.

a. Requests will be considered only upon written application submitted by the member concerned. Requests which do not contain the complete information, documentary evidence, and other required data will be returned to the individual with specific indication of the additional information desired."

* * * * *

(c) Requests for delay or exemption submitted on the basis of extreme personal or community hardship—

(1) May be considered when the extreme personal or community hardship condition occurs not more than 6 months prior to receipt of alert or active duty orders.

(2) May not be considered when such hardship condition existed at the time applicant submitted DA Form 1140–1 (Army Reserve Status Verification Questionnaire) as prescribed in AR 140–25, whichever is the more recent, and applicant failed to request transfer from the Ready Reserve by reason of hardship."

3–14. Action by area commanders and CO, USAAC, and CO, USARCPC. The commander having responsibility for the administration of delay and exemption procedures over USAR members under their jurisdictional control will take the actions outlined below on requests for delay or exemption submitted by such members.

a. Notify the reservist of the decision rendered on request for delay or exemption.

b. When the request is denied, notify the member of such denial and reason therefor, together with his right to appeal such decision."

3–15. Appeals.

a. General. Appeals for reconsideration of denial of requested delay or exemption may be considered when the member can furnish additional evidence which may warrant further review of his original request. When the basis of the appeal is for reasons other than furnished in the original request, such requests will be processed as an initial request for delay or exemption.